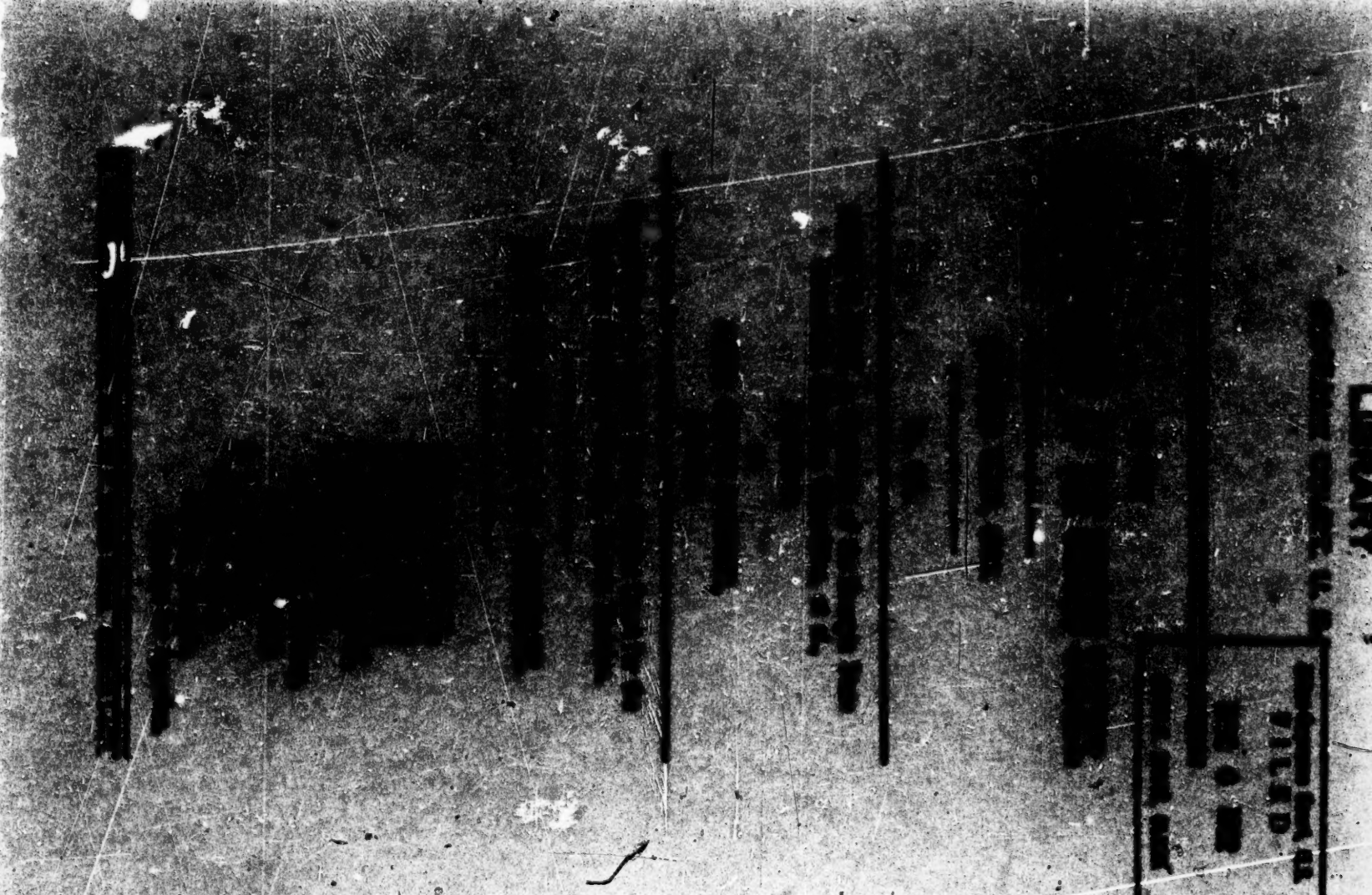

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 112.

JAMES H. GRAY, as Chairman of the Georgia State Democratic Executive Committee, et al.,
Appellants,

vs.

JAMES O'HEAR SANDERS,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

BRIEF ON BEHALF OF APPELLEE.

I.

STATEMENT OF THE CASE.

The facts, inferences aside, as stated by the Appellants in their Statement of the Case are correct.[1]

[1] Appellants ignore, for example, the fact that Congressman James C. Davis would have achieved his eighth renomination in the Fifth Congressional District had the governing body of the Democratic Party in that race used the former unit rule which it voluntarily abandoned after the Court's opinion below. However, on a popular vote, Congressman Davis was defeated as he would have been on two previous occasions on which he prevailed by county units. Appellants do not refer to the soaring registration of voters in populous counties and the heavy votes

It should perhaps be noted that the Party authorities made no attempt to employ a unit rule such as would have met the standards laid down by the panel court. Nor did they or any of the Appellants seek a stay of that court's decree in this Court. There has not been the slightest suggestion or inference from any source that the opinion of the panel court has "impair(ed) the Court's position," or "lost public confidence in its moral sanction" or has demonstrated "the futility of judicial intervention" in this field.[2]

In their Statement of the Case, the Appellants allude to the fact that subsequent to the filing of **Toombs v. Fortson**, 205 F. Supp. 248, the upper house of the Georgia Legislature was reapportioned. Appellants then suggest that this development "may have some bearing on the issues of this case . . ." (Appellants' brief, p. 10). As of this date, the lower house still reflects precisely the same malapportions present in the unit system before it was revised on April 27, 1962. That house, of course, must pass on all legislation, including any further revision of the county unit system, were this Court to reverse the panel court below.

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cast there following the demise of that unit rule." Moreover, the successful candidate for Governor, Carl Sanders, qualified unexpectedly for the office only after the Court's opinion below. He was the first successful candidate for the office who resided in a populous county in over forty years. Appellants did not refer to the vast change in campaign tactics in the recent primary in which Georgia's urban citizens, comprising more than 50% of the population were assiduously courted regardless of race. It is merely an assumption and probably false that the primary results for statewide offices would have been the same under the unit as popular vote. See Appendix A. Moreover, the decision below was rendered only a week before entries to the primary were closed. It is impossible to say what results would have obtained because we do not know what candidates would have qualified, if it had been known for a longer period of time that a popular vote would prevail.

[2] See dissenting opinion of Mr. Justice Frankfurter, *Baker v. Carr*, 369 U. S. 186; 7 L. Ed. 2d 663 (1962).

II.

QUESTIONS PRESENTED.

As stated in Appellee's Motion to Affirm, the questions presented by him may be subsumed under those of the Appellants. These are two:

1. May a primary election, governed by state law and an integral part of the procedure of choice and which in fact effectively controls the choice of state house officials, be conducted by a county unit method despite the provisions of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution?

2. May a primary election, governed by state law, and an integral part of the procedure of choice and which in fact effectively controls the choice of United States Senators, be conducted by a county unit method despite the provisions of the Seventeenth Amendment to the Federal Constitution which requires that elections of said Federal offices be "by the people" of the states?

III.

SUMMARY OF POSITION.

1. The Georgia Democratic Primary is governed by state law; is an integral part of the procedure of choice for state house offices and United States Senators from Georgia; and effectively controls the choice for these offices. This primary is therefore constitutionally protected by the Equal Protection Clause of the Fourteenth Amendment and is an election within the meaning of the Seventeenth Amendment to the United States Constitution.

2. The issues presented here involve the franchise, not legislative representation. Histories of legislative assem-

blies are not relevant to the constitutional principles here involved. The history of the county unit system itself is similarly irrelevant save as it demonstrates a purposeful and effective discrimination against urban centers and negro voting.

3. The statute attacked and as amended violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution when applied to any primary for state house officers and United States Senators.

4. The statute attacked and as amended violates the Seventeenth Amendment to the United States Constitution as applied to any primary for United States Senator from Georgia.

IV.

ARGUMENT.

1. Democratic Primary Subject to Constitutional Provisions.

The Georgia Democratic Primary is constitutionally protected by the Equal Protection Clause of the Fourteenth Amendment and is an election within the meaning of the Seventeenth Amendment to the United States Constitution.

Primaries in Georgia are strictly governed by state law, of which the statute attacked is but a part (R. 14-24). In addition to those provisions contained in the record, others, civil and criminal, govern and protect the primary.[3]

Georgia Code § 34-3218 (R. 20) provides as follows:

> "Laws of force.—All the laws in reference to the qualification of voters and their registration . . . apply to (primary) elections . . ."

The basic law in the field is a provision of the State Constitution. Article II, Section I, Paragraphs I and II, Georgia Constitution (R. 14 and 15), provide inter alia:

> "**Elections by the people** shall be by ballot . . ." (Emphasis supplied.)

and

> "Every citizen of this state who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and

[3] See *Chapman v. King*, 154 F. 2d 460, at 463-4 (C. A. 5, 1946).

vote at any election **by the people** . . ." (Emphasis supplied.)

The primary laws are inextricably intertwined with the voters' qualification and registration laws, which are in turn derived from the Georgia Constitution. Consequently, even regulations of the Georgia Democratic Party constitute "state action" within the meaning of the Fourteenth Amendment. This is the holding of **Chapman v. King**, 154 F. 2d 460 (C. A. 5, 1946):

> "Under Georgia Law, primary election to select candidates for federal and state offices is an integral part of electoral process of the State . . . and regulations presented by party executive committee under statutory authority limiting participant voters to white qualified electors constituted 'state action' within the Fourteenth and Fifteenth Amendments."

The Georgia Supreme Court holding in **Cox v. Peters**, 208 Ga. 498, 67 S. E. 2d 579 (1951), appeal dismissed 342 U. S. 936, that the Democratic Primary under the unit rule is not "the election" is not only erroneous[4] but beside the point. Moreover, the Georgia Democratic Party is and has been the instrument controlling the choice of state house officers and United States Senators from Georgia since the beginning of this century. The record shows that "Georgia has been a one-party state since the removal of the Federal troops in 1871. Few Republicans have held office in the state since this time. None but Democrats have held a state (house) office since the 1890 decade, after which period this party has been com-

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[4] The majority of the Court in *Baker v. Carr*, supra, said of *Cox v. Peters*: "But compare *Terry v. Adams*, 345 U. S. 461." The Terry case involved a pre-primary primary not regulated by state law for county and precinct offices. There was no history of this procedure controlling any choice. The relief granted in that case disposed of any question of the protection of the Georgia Democratic Primary by the Fourteenth Amendment.

pletely in control of statewide elections" (R. 115). Appellant Fortson, the State Archivist, while not affirming the Appellee's request for admission (Request = 9 R. 41) that no candidate, other than the nominee of the Democratic Party, for any state house office and United States Senator had been elected thereto since 1872, did not deny these assertions (R. 55). Appellant Fortson, respondent to Appellee's request for admission (Request = 30—R. 46), did not deny that since 1900 no candidate for United States Senator or state house office had been on the general election ballot other than the candidate of the Democratic Party—except to say that "In 1940 Eugene Talmadge appears on the general election ballot as candidate for governor as nominee of the 'Independent Democratic Party'" (R. 57-58).

The Georgia Supreme Court in **Thompson v. Talmadge**, 201 Ga. 867, 41 S. E. 2d 883 (1947), reviewed the history of the Georgia Democratic Primary for Governor as of 1948. (The subsequent history of that office and for the United States Senator from Georgia will not differ.) The Court said:

> "Moreover, we are authorized, if indeed not required, to give consideration to the history of elections for Governor over a period of approximately half a century before the drafting and submission of the present Constitution, and its ratification by the voters in 1945. Throughout that period there had been one and only one dominant political party in this State. That party was and is the Democratic Party. Every Governor throughout that period was a Democrat, nominated by the Democrats of Georgia in a Democratic Primary, after a campaign in which vital issues were discussed throughout the State and embodied in a platform of principles upon which he sought nomination. The only opposition in the general elec-

> tion that any Democratic nominee had ever encountered throughout such period was an 'Independent,' or a member of some minor opposing party, and some write-in votes for persons who 'were not candidates'" (pp. 884; 897).

The tradition of the century prevailed in November, 1962. None other than Democrats offered in the general election for any state house office nor for the United States Senate. As a practical matter, no Georgia governor nor Senator has been effectively elected within the memory of living men in any but the Democratic Primary.

In non-presidential election years, except when some grave constitutional issue (such as the attempt to engraft the county unit system into the Constitution), is to be voted upon, the general election vote is only a fraction of the primary vote (R. 147).

The Legislature in enacting statutes governing primaries, including the one attacked, has referred to these consistently as "primary elections." As we have noted, qualification of voters in the Georgia Democratic Primary, including that for United States Senators, are derived from the constitutional provisions governing "elections by the people." By tradition, by Constitution, by statute, and by result, the Democratic Primary is not only **an** election, but **the** election in Georgia for all state house offices and for United States Senators.

2. Franchise, Not Legislative Representation at Issue.

The issues presented here involve the franchise, not legislative representation. The histories of legislative

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Under the Fourteenth Amendment claim, it is not necessary that the Appellee show that action under the county unit system can elect. All that is required is that he show that state action is involved. Under the Seventeenth Amendment claim, it is necessary that the Appellee establish the primacy of the primary election for United States Senator.

assemblies are irrelevant. So is the history of the county unit system except as it demonstrates a purposeful and effective discrimination.

Representation—A Shared Right; Voting—A Personal Right.

Though frequently confused, the merits of a county unit case have logically and traditionally no relevance to a legislative representation case. The confusion arose because apportionment precedents were continuously cited **as authority to deny a judicial hearing** on the merits of a county unit case.*

Except in a Swiss canton or a New England town meeting where every man represents himself, a citizen is represented by delegates chosen by himself and others. The district all shared the representation. They must; there is no other way.

Almost everywhere voting in the American states is a **personal** right. One does not normally share this right. See **United States v. Bathgate**, 246 U. S. 220 at 227, 62 L. Ed. 676, at 680 (1918), where this Court stated: "The right to vote is personal." No weighting or division of

* This Court, in *Baker v. Carr*, adopted much of the reasoning set forth by movant in *Hartsfield v. Sloan* (October Term, 1957, Case No. 283 Misc.). Hartsfield contended that prior county unit cases and the representation cases which had barred him a hearing on the merits all had thundered on the Court's application of the doctrine of equitable discretion. Hartsfield insisted that neither jurisdictional nor constitutional questions involving the separation of powers were involved in any of the precedents cited to oppose him. He further contended that the questions of equitable discretion should be resolved in his favor due to the case with which the degree could be molded and relief applied in a county unit case. *Baker v. Carr*, supra, laid to rest all of the issues of standing, jurisdiction and justiciability which had previously beset county unit suits. Apparently the Appellants here agree for they have neither presented nor argued such questions on this appeal.

this right is ever necessary nor is it usual. What inference follows from these circumstances?

A Court seeking to apply Equal Protection standards to **representation cases** must perforce fashion standards and apply them to constantly shifting populations and other possible but reasonable criteria. There is no other way except to decree the end of all districts and to require statewide elections.

No such difficulties are presented in franchise cases. The relief prayed in such a case is simple: Abolish or forbid the utilization of the contrived step by which the **normal** popular tabulations are converted into a weighted and distorted result. Mr. Justice Douglas in **South v. Peters**, 339 U. S. 276, 94 L. Ed. 834 (1950), put the point succinctly:

> "The rights they seek to enforce are personal and individual. Moreover, no decree which we need enter would collide either with Congress or with the election. Georgia need not be remapped politically. The Georgia Legislature need not take new action after our decree. There is no necessity that we supervise an election. There need be no change or alteration in the place of the election, its time, the ballots that are used, or the regulations that govern its conduct. The wrong done by the County Unit System takes place not only after the ballots are in the box but also after they have been counted. The impact of the decree would be on the tallying of votes and the determination of what names go on the general election ballot. The interference with the political processes of the state is no greater here than it is when ballot boxes are stuffed or other tampering with the votes occurs and we take action to correct the practice."

The simplicity of the remedy sought and achieved below has a bearing on the issue of justiciability. This is ob

viously the teaching of the **Baker** case. The majority in **Baker** said "jurisdiction" and "justiciability" had sometimes been confused. On jurisdiction a court inquires whether the matter arises under Article III, Section II of the Federal Constitution, is a "case" or "controversy", and is of a cause described by jurisdictional statute. On justiciability, the court inquires "Whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."

In **Baker**, despite the obvious complications of molding a representation and apportionment decree, all but two justices felt the issue justiciable. The issue before this Court is clearly justiciable and jurisdiction is equally clear. On standing, jurisdiction and justiciability, the **Baker** case supports the petition at bar unless in the words of Mr. Justice Brennan the "claim (is) so attenuated and unsubstantial as to be absolutely devoid of merit."

History of Representation Irrelevant; History of the County Unit System Shows a Pattern of Intentional Discrimination Against Urban and Negro Voters.

The Primary did not become a statewide institution in Georgia until 1898 (Appellants' brief, p. 31). The Fourteenth Amendment was not adopted until 1868; the Seventeenth Amendment in 1913. History of the colonial period is scarcely relevant to the issues which here arise under these amendments.[7]

The history of the theory and practice of representation in legislative assemblies throws no light on questions of

[7] Once Georgia was a colony; but a constitutional Governor today may not claim royal prerogatives. Once slavery was legal; once the Governor was named by the Legislature; none of these circumstances can tarnish the rights a citizen may enjoy under the United States Constitution.

franchise dilution and debasement. Far more to the point is the explicit provision of the Georgia Constitution of 1945:

> "**Origin and Foundation of Government**—All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people, and at all times amenable to them."

The history in this record shows that the county unit system fits somewhat in the pattern to which Mr. Justices Frankfurter and Harlan alluded in their dissent in **Baker v. Carr**:

> "This is not a case in which a state has, through a device, however oblique and sophisticated, denied Negroes or Jews or Red-Headed persons a vote or given them only one-third or one-sixth of a vote. That was Gomillion v. Lightfoot, 364 U. S. 339."

The affidavit of Professor Bonner (R. 93-118) shows the county unit system to be a discrimination which has grown out of and has been nourished upon a history of rural antagonism to urban centers and is connected with negro disfranchisement. The latter factor in the unit system is interwoven as a Georgia reaction to this Court's history of protection of the negro's right to vote. When Reconstruction was terminated, Georgia established a constitutional convention to write the organic law of 1877. White Democrats nominated convention candidates and their county leaders urged these to be supported in the general election (R. 105-106). When the white primary system was threatened by the rise of Populism, the "Grandfather Clause" was enacted in 1908 (R. 107). The "Grandfather Clause" approach was invalidated in this Court in 1915. **Guinn v. U. S.**, 138 U. S. 347 59 L. Ed.

1340. In 1917, the first county unit statute was enacted. Previous to that time, it had been in use as a party rule. At that time "it was clear to most politically minded men that such a device as the county unit system was needed if the reappearance at some time in the future of large numbers of negro voters was to be prevented" (R. 111).

Still, as no second party emerged, the white primary continued to be an effective instrument for Negro disfranchisement until 1946 following **Smith v. Allright**, 321 U. S. 649, 88 L. Ed. 987 (1944), and **Chapman v. King**, 154 F. 2d 460 (C. A. 5, 1946). Thereafter, nothing legally remained to accomplish Negro disfranchisement save the county unit system. Then it was that the naked racial arguments in the defense of the system and for its extension into the general election machinery were unabashedly advanced (R. 112).

The usefulness of the county unit system as an implement of Negro disfranchisement is implicit in the figures furnished by Appellant Fortson (R. 165). These show that in general, Negro registrations are low (and in some cases non-existent) in counties whose people enjoy disproportionate voting power under the unit rule.[3] The record (p. 91) shows a list of counties in which Negro registration in 1958 was less than 10% of the Negro population of voting age (there are thirty-one such counties), and the "inequality ratio" of the county. The record (p. 92) shows the percentage of Negro registrations to Negro eligibles in the ten largest counties and the "inequality ratio" in these.

Professor Bonner summarizes the situation (R. 114):

> "While Negroes represented 29 per cent of the total voting-age population of the state, they were still

[3] The figures are as of 1958, the last year they are so available.

only 12 per cent of the total voter registration. However, this 12 per cent was heavily concentrated in the larger urban centers. The highest registrations of Negroes were in Fulton, Bibb, Richmond and Muscogee counties. With the exception of those in Liberty and McIntosh and several other counties, rural Negroes remained substantially unregistered in 1950." These facts had a considerable bearing upon the determination of rural law-makers to maintain the county unit system."

3. **County Unit System Denies Equal Protection.**

The statute attacked and as amended violates the Equal Protection Clause to the United States Constitution when applied to any primary for state house officers and a United States Senator from Georgia.

The Appellee contends here, as before the panel court, that in a **voting** or **franchise** case, as contrasted with a **representation** case, no classification is permissible under the Equal Protection Clause by which the vote of one qualified voter is diluted, distorted or reversed.[9] The Appellee contends here that the county unit system per se is unconstitutional under the Fourteenth and Seventeenth Amendments.

Consistent with the Fourteenth Amendment's Equal Protection Clause, a state may, as Georgia has, establish reasonable qualifications for voters. Once these qualifications are established, however, the state may not thereafter discriminate amongst those whom it has qualified, granting to some a fraction of a vote and according to others many times that. The Georgia Supreme Court has held that

[9] As and for the reason stated in Appellants' Motion to Advance (p. 10, footnote 8) the standards established for a "constitutional" county unit system by the panel court ineluctably bind the appellants to a popular vote.

once the qualifications of voters have been established, the power of further classifications by statute is constitutionally exhausted. See **Tolbert v. Long** and **O'Kelly v. Long**, 134 Ga. 292, 67 S. E. 826 (1910).

There is a difference in the classification permitted in legislative districting and in voting. In the former instance, in order to avoid elections at large and to accord various groupings within the population some representation, districting is essential. Of course, no districting, however fair the intention, can create mathematically equal districts. Districting is perforce a form of classification which requires the exercise of judgment and selection. This process, under the rule of **Baker v. Carr**, must proceed pursuant to constitutional standards developed under the Equal Protection Clause.

In a franchise case, however, no further classification is required in order to give each voter a share in the election. The vote of each voter is his share. Weighting and devalution of the franchise of particular voters, even if accomplished by a perfectly consistent pattern, is not an allowable state policy for such classification could not serve any rational end, and its only purpose could be discrimination.[16]

The panel court did not adopt the argument of Appellee that a county unit system per se violates the Equal Protection Clause. The panel court in this respect was in error.

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[16] Throughout the constitutional debate and the discussion of political philosophy cited by Appellants, nowhere is it suggested that in the area of franchise as such there should be any classification or weighting of individual votes.

The Georgia County Unit Law As Amended, If Not Unconstitutional Per Se, Violates the Equal Protection Clause as an Unreasonable, Arbitrary and Capricious Classification Which Established a Pattern of Invidious Discrimination Amongst Georgia Voters.

Ample grounds exist for declaring the amended county unit act unconstitutional as an arbitrary and capricious discrimination even in a field where some classification were permissible.

The statute attacked reflects no policy except to accord to less people more voting power than to more people. Working towards this result, the Legislature achieved it by totally inexplicable and indefensible means.

Prior to the amendment of the county unit statute, the Appellants argued that the Neill Primary Act was a consistent system of classification in that counties had either 6, 4 or 2 unit votes, depending upon the population grouping into which each fell. Efforts to repeal or modify the county unit system had been of no avail until the complaint was filed in this case on March 26, 1962. Nine days later, on April 5, the Governor called an Extraordinary Session of the Georgia General Assembly to meet April 16 and also groups of legislators to convene earlier to "meet the threat to the county unit system posed by pending Federal Court litigation" (R. 168, 169) and to "preserve, protect and defend the **traditional** Democratic institutions **existing** in this state". (Emphasis supplied). The record shows, through a Fulton County representative present in one of the pre-session legislative conferences that "from counsel participating with the Governor in the conference it was clear that the purpose of the conference and the legislative call was to preserve the county unit

system without breaking down the traditional voting strength of the smaller counties under the county unit system as now enforced" (R. 167).

Appellants now allude and rely upon the amendment to the county unit law as having established ". . . a bracket system . . . which gradually reduced the percentage of unit votes per given number of persons in each succeeding larger population bracket" (Appellant's Brief; p. 6). This amendment is the successor to the Governor's so-called 545 "Equal Proportions" unit proposal (R. 129, 144). Under the said 545 unit proposal, the 121 smallest (2-vote) counties containing 30.8% of the population eligible to vote would have been stripped from 59% of the state's unit votes to 44.4%, though the 14 largest counties with 50.4% of the eligibles would have only been accorded 39.8% of the units. This 545 unit proposal which would have cost some counties some unit votes was quickly abandoned.

To prevent any county from losing any unit votes another "Equal Proportions" proposal was advanced by the administration during the Extraordinary Session. The mathematics of this proposal were developed by Professor Gaylord (R. 144) under the heading "No Counties Losing Votes—'Equal Proportions'". This proposal never really was seriously considered. It would have given the 14 largest counties with 50.4% of the persons eligible to vote 44.7% of the units, while the 121 smallest counties with 30.8% of the eligibles would have been reduced to 37.6% of the unit votes.

Considered, however, and passed by the Georgia Senate but finally rejected, was a Senate Rules Committee substitute for the 547 unit law. That Senate substitute would have provided for 930 units, of which Fulton County would have received 112. The Senate substitute would have accorded Fulton County with 14.1% of the state's

population, 12.0% of the unit votes. The 547 proposal, which is the present law, accords Fulton but 7.3% of the units.

The 547 plan substituted contained no "equal proportions" feature. It is this plan which became the amendment to the Neill Primary Act and which the Appellee amended his complaint to attack during the course of the hearing below.

The amended acts "bracket system" assigns units thusly: Counties from 0-15,000 population receive 2 units; then there was an increment of one unit for the next 4,999 persons; then an increment of one unit for 14,999 persons; then an increment of one unit for 14,999 persons; and thereafter increments came in pairs—but only pairs—of 2 units for 29,999 persons. Under this new device, no counties above 60,000 could receive any increment for less than a 30,000 population gain. At the top of the population scale a gain of 30,000 persons would entitle a county to 2 additional units; at the bottom of the scale, the same population gain would beget 4 units. At the top, a 29,000 population increase receives no unit increment; at the bottom, such a gain entitles a county to 4 units.

Neither geography, ruralism, occupation nor relative size will account for the inequalities in the unit assignments: Taliaferro County is a small (2-vote) county, rural and agricultural. It is surrounded by six small (2-vote) rural and agricultural counties: Wilkes, Oglethorpe, Greene, Hancock, Warren and McDuffie (R.-177). Taliaferro received 1 unit for 1685 persons: Warren, one for 3680; Oglethorpe, one for 3,963; Hancock, one for 4,989; Wilkes, one for 5,400; Greene, one for 5,596 and McDuffie, one for 6,313. The discrimination against citizens of Fulton County are paralleled by those within the brackets of smaller counties. Echols, a 2-vote county receives one unit for each 938 persons. Screven County, a two-vote county, one unit for

7,459 persons. Screven County suffers another discrimination when compared to the treatment accorded Hart County. Hart contains only 310 more persons than Screven and thereby received an extra unit. Hart and Screven, each bordering the Savannah River, are rural counties without large cities. One has a unit for 7,459 persons; the other a unit for each 5,076.

As stated in Appellee's Motion to Affirm:

> "Throughout the State, units were assigned in a 'crazy-quilt' pattern creating grave and absolutely senseless disparities amongst counties in the same geographic areas. Here are but a few examples: In the Sixth Congressional District, Crawford County, adjoining Bibb, has a unit per each 2,900 people; Bibb one unit per 11,000 population. In the Eighth Congressional District, Echols County, adjoining Lowndes, has one unit per 900 persons; Lowndes, one unit per 8,000 people. In the Fifth Congressional District, Rockdale County, adjoining DeKalb, has one unit per 5,250 people; DeKalb one unit for each 12,850 people. In the Tenth Congressional District, Oconee County, adjoining Clark, has one unit per 2,100 people; Clark one unit per 7,500 persons."
>
> "Fulton County voters under this new Act were accorded but .52% of an equal vote but Echols voters were given 7.69 times an equal vote. Through the state, the advantages and disparities fell, not in any geographic location, but haphazardly. Rural people in Fulton County (which ranks third in rural population amongst the 159 counties of the State) suffered the same discrimination as the urban people in Fulton. Bankers in Twiggs were advantaged in the same way as the tenant farmers living there. The basis, if any, of the classification was not geographic but by population, the more the people, the less the vote of each."

If any classification were permitted amongst qualified voters so that some would have one-half a vote and others fourteen times that, such would have to be based on some legitimate public purpose and not caprice. The Appellee contends that his right to vote is as Mr. Justices Douglas and Black have said in **South v. Peters**, supra, "personal and individual". But if these rights were not, the Equal Protection Clause cases establish, to use the words of Mr. Justice Brennan in **Baker v. Carr**, standards which "are well-developed and familiar." From the hundreds of cases decided under the Equal Protection Clause, certain criteria and guidelines clearly emerge. Any investigation into the question of proper classification under a particular factual situation must begin with the nature of the subject matter of the classification.

> "In determining what is within the range of discretion and what is arbitrary (classification), regard must be had to the particular subject of the State's action." **Smith v. Cahoon**, 283 U. S. 553 at 567; 75 L. Ed. 1264, at 1274 (1931).

The classification must rest on real and substantial differences between the classes, having a natural, reasonable and substantial relation to the subject of the legislation. The classification must be such that all persons "similarly situated" receive equal treatment. The class itself must be germane to the purposes of the law and the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the division into such class. There must be a natural, inherent and intrinsic difference between the components of the class which establishes the need or desirability of unequal treatment. Classification by territory or population is permissible only when the subject matter of the legislation lends itself to such classification and when, because of the nature of the subject matter dealt with, territorial or population classification

is able to separate or isolate individuals having attributes distinct from those living outside the territory or population group.

How stands the county unit system under a rule of reasonable purpose?

Is it a classification based on educational levels? If so, presumably a rational plan, i. e., one not merely invidiously discriminatory, would grant to counties with higher educational levels a voting premium. The county unit system does the opposite (R. 159).

Or is the classification based on property and income? Many voter qualifications have been so based. The rationale of such qualifications have had some appeal on the supposition that those with substance have a stake justifying an interest and a need to protect the same by government. A rational classification would therefore traditionally accord those with a greater stake the voting premium. The county unit system does the opposite (R. 157, 158, 159).

Or is the classification based on geography or region? Sometimes the unit system has been referred to as a "geographical distribution of electoral strength." **South v. Peters**, supra. Let us determine whether Georgia has made such a classification in its unit distribution. Presumably the purpose of such a plan, if rationally conceived, would be to treat such geographics areas as such with either a greater or lesser voting influence. Some consistency of treatment would therefore be expected amongst geographically similar areas. The following counties all lie in the North Georgia mountains, none far separated and some adjoining. This is the unit distribution per population amongst them:

DAWSON	1 for 1,795
TOWNES	1 for 2,269
LUMPKIN	1 for 3,620
RABUN	1 for 3,728
PICKENS	1 for 4,451
FRANKLIN	1 for 6,637

The following counties are in a tier in the extreme Southwest section of the State bordering on Alabama. The units are distributed amongst them thusly:

QUITMAN	1 for 1,216
CLAY	1 for 2,275
SEMINOLE	1 for 3,401
EARLY	1 for 6,575

The following counties constitute the Southern border of Georgia. They received units as follows:

ECHOLS	1 for 938
CHARLTON	1 for 2,656
CLINCH	1 for 3,272
CAMDEN	1 for 4,987
BROOKS	1 for 5,097
GRADY	1 for 6,003
DECATUR	1 for 6,300
WARE	1 for 6,843
THOMAS	1 for 6,863
LOWNDES	1 for 8,211

The exercise could be repeated for every region, soil belt, climate area, whatever geographical factor by which one could conceivably classify. There is simply no rationality or geographical principles to be found in the distribution of unit strength.

Could it be that the distribution of units was made to prevent an accumulation of voting strength in metropolitan areas? Then why were the people in the five-county metropolitan area around Atlanta, recognized as a func-

tionally unified complex and so considered for other purposes, treated differently within the counties comprising the complex? Those in Clayton County enjoy one unit for 7,727 persons; in Fulton adjoining, separated at points by a street, the neighbor shares a unit with 13,908 others. In Cobb County, the distribution is one unit for 11,417; in DeKalb one for 12,836; in Gwinnett, one for 8,708. To move across the street or river in this metropolitan complex, can cost a citizen whose place of work remains the same, up to one-half of his influence as a voter. Should an Atlanta businessman or laborer move across the Fulton line to adjoining Forsyth County, he could improve his influence to the ratio of one unit for 6,085. Should he go one county north to live in Dawson and work in Atlanta, he could receive a further electoral bonus. The unit strength there is 1 for 1,795.

Many rationalizations have been attempted for the county unit system; but there is only one explanation for it: It is designed to accomplish minority rule of the majority. The 547 amendment to the unit law by design left the 121 smallest counties 49% of the electoral power—within 1% of control.[11] When the panel court offered the Legislature or the Democratic Party an opportunity to construct a county unit system limiting this impact, neither the State nor the Party authorities showed the slightest disposition to adopt such a plan. The purpose of the exercise was discrimination and minority control. If this is limited, the inducement (and the "rational explanations") for an electorally voting system evaporate.

The county unit statute as amended is subject to the same infirmities which have caused every judge and justice

[11] The record (p. 143), contains a demonstration of the percentage of voting strength of persons in age groups eligible to vote which are needed to elect under the amended county unit statute in races between from two to five candidates. In the former instance, 15.4% of these eligibles could elect; in the latter, only 6.1% is absolutely required.

who ruled the issue justiciable to declare it unconstitutional. See dissenting opinion of Judge Andrews in **South v. Peters**, 89 F. Supp. 672; of Justices Douglas and Black, **South v. Peters**, 339 U. S. 276, 94 L. Ed. 834, and, of course, the unanimous opinion of the panel court in this case. Moreover, the Tennessee Supreme Court in 1938 held that Tennessee's county unit statute was unconstitutional. The Tennessee unit system was an "open end" device which gave every county its unit vote equivalent to 1% of the votes cast there in the previous gubernatorial election. This tied voting power to votes cast in the previous election. Nevertheless, the system failed its constitutional test under the Equal Protection Clause in **Gates v. Long**, 113 S. W. 2d 388. The infirmity found was contained in the one exception to the ratio between units and votes cast. That exception provided that no county could have more units than ⅛ of 1% of its population. Though this rule was uniformly applied to all counties, large and small, the Tennessee Supreme Court could find no rational basis for classifying voting influence so as to punish citizens whose areas vote in large numbers. The Tennessee Supreme Court stated:

> "In our form of government a large vote in a constitutional election cannot be regarded as an evil, and dealt with as such under the police power of the state. On the contrary, universal exercise of the right of suffrage must be regarded as the ideal support of democratic institutions."

The record (R. 87) shows how Fulton County and Echols County would have fared under the Tennessee Law. The facts are as shown below:

County	Pop.	Unit Under Present Law	Max. Votes Under Tenn. Law	Votes Cast in 1958	United Votes Assigned Without Regard to ⅛ of 1% Limitation
FULTON	556,326	40	695	83,265	833
ECHOLS	1,876	2	3	588	6

Appellants attempt to place a statewide Georgia Democratic Primary on the legal plane of a party convention. Of course, such a contention, if adopted, would undermine all the white primary cases. Justices Douglas and Black disposed of this argument in **South v. Peters**:

> "It is said that the dilution of the plaintiffs' votes in the present case is justified because equality of voting is unnecessary in the nomination of United States Senators. Thus it is pointed out that in some states nomination is by conventions. But that proves too much. If that premise is allowed, then the whole ground is cut from our primary cases since Nixon v. Herndon, which have insisted that where there is voting there be equality."

The Electoral College Analogy.

The Federal Electoral College analogy relied upon by the appellants and partially adopted by the panel court in its decision is unsound. The Electoral College is not derived from a planned intention to discriminate against populous areas, but from a purpose to represent states **as such and** the populations thereof in an admixture of electoral strength. The sharing of this electoral strength by popular voting for electors within the state is an historical accretion. Nor is there any constitutional provision for the unit rule by which electors in most states cast their ballots. Popular voting for electors is itself a concession to popular government.[12] The Georgia state-house officers and United States Senators are, under Georgia's own Constitution, required to be elected by the people. Georgia is not and never has been the "United Counties of Georgia." No com-

[12] Aside from any explicit preference for the indirect election of the American President, it would have been physically very difficult to have conducted national campaigns and elections in those times before railroads, electric communication and national parties.

promise amongst Georgia counties made Georgia. Georgia made each of its counties and has unmade a few.[13] It is true, however, that until the panel court's decision below, counties did rule Georgia.

In any comparison of the county unit system with the Electoral College, one is struck by the fact that neither under the Neill Act nor the Amendment thereto did the assigned units fluctuate directly with population. The Electoral College does once account has been taken of the three votes to which every state is automatically entitled.

4. County Unit System Violates Seventeenth Amendment.

The use of the county unit system in a primary election for United States Senator violates the Equal Protection Clause of the Fourteenth Amendment and it also violates the Seventeenth Amendment which required that this Federal office[14] be "elected by the people of the several states". The Seventeenth Amendment does not leave the above requirement with that simple command but goes further

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[13] Campbell and Milton were combined with Fulton on January 1, 1932. Predictably, Fulton did not receive the unit votes of the counties which it absorbed.

[14] The right to vote for U. S. Senator is derived from the Federal Constitution. This Court held in *U. S. v. Classic*, 313 U. S. 299, 85 L. Ed. 1368, that the right to vote for a United States Representative was derived from the Federal Constitution, Article I, Section II. The right to vote for United States Senator is similarly derived but from the Seventeenth Amendment. The *Classic* case further defines what an "election" is within the meaning of this Federal right.

> "Where the State law has made the primary an integral part of the procedure of choice, *or* where *in fact*, a primary effectively controls the choice, the right of an elector to have his ballot counted, is likewise included in the right protected by Article I, Section II."

The same rule obviously applies in case of the election to Senate since the adoption of the Seventeenth Amendment.

and defines the class who shall comprise voters for that office:

> "The electors in each state shall have the qualifications required for electors of the most numerous branch of the State Legislatures."

Georgia, under this amendment, may define the qualifications of electors and has in Article II, Section I, Paragraphs I-IV of its Constitution, previously cited. The Constitution of Georgia did not establish a unit system for voting in an election for the most numerous branch of its Legislature and none has ever been so employed, either by statute or custom. Georgia, having defined the electors for its most numerous legislative branch, cannot constitutionally, under the Seventeenth Amendment, by statute, party rule or custom, establish a different electoral system for the United States Senate. County units are not people and neither history nor tradition can make them so. The entire purpose of the Seventeenth Amendment may be subsumed under the textbook rubric which refers to it as the provision "For the Popular Election of Senators."

The Democratic Primary of Georgia is an election for United States Senator, of that there can be no doubt (See p. 4 et seq. of this brief). Through the operation of the county unit system, the United States Senator from Georgia has been elected by substantially less than a majority of the votes cast for that office. In 1938, the successful candidate in the primary election polled 141,285 popular votes out of 321,311 cast (R. 133).

The election of Senators by units is as contrary to the Seventeenth Amendment as a choice by Legislatures or by other elections through a representative process. The Seventeenth Amendment forbids the indirect election of United States Senators and the county unit system is nothing, if not that.

V.

CONCLUSION.

The county unit system for party primaries in Georgia is violative of the Equal Protection Clause of the Fourteenth Amendment and the provisions of the Seventeenth Amendment. The statute attacked which results in dilution and distortion of votes is per se unconstitutional and is further invalid because of the invidious discrimination thereby established. The statute attacked is further invalid as a denial of the constitutionally protected right to vote for United States Senators from Georgia.

Respectfully submitted,

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APPENDIX A.

Appellants in their brief to this Court stated that the results of the Georgia Democratic Primary held on September 12, 1962, would not have been different had the county unit system been in force (Appellants' brief, p. 10). From the numerical correctness of this fact, appellants draw certain inferences (Appellants' brief, pp. 52-53) which we respectfully submit, although substantially irrelevant to the issues in this case, are incorrect. Appellants' inference that there would have been no difference in the outcome of the primary had the unit system been in force totally ignores the impact that was had upon the election resulting from the absence of the unit system.

In three specific areas this impact was immeasurable:

1. Increasing voter registration and participation in urban areas;

2. Encouraging the candidacy of persons who would not have otherwise offered for public office; and

3. Altering the campaign tactics and approaches of candidates for state wide offices.

The foregoing propositions are demonstrated by the following excerpts from the Atlanta Journal and Constitution for the dates indicated. This does not purport to be an exhaustive summary of press reaction but is shown merely to illustrate the fallaciousness of any inference drawn merely from the results of the primary which does not take into account the pervading effect resulting from the fact that Georgia voters on September 12, 1962, participated in the first popular vote primary in five decades.

May 2, 1962, Atlanta **Constitution**, headline:

"CITY VOTERS FLOCK TO REGISTER."

September 11, 1962, Atlanta **Journal**, in an article headlined "A RECORD TURNOUT OF VOTERS IS FORECAST":

> "State Democratic Party Secretary George D. Stewart predicted a record turnout of 850,000 votes because of metropolitan area voters taking full advantage of the equal vote they are casting for the first time in a half-century."

September 13, 1962, Atlanta **Journal**, under headline "CITIES FURNISH THE WHEELS FOR SANDERS' BANDWAGON":

> "Georgia cities put the wheels on Carl Sanders' gubernatorial bandwagon.
>
> "Urban voters broke records right and left."

May 6, 1962, Atlanta **Constitution**, Editorial entitled "New Political Vigor":

> "The closing of the list for the State Democratic Primary launches Georgia on one of the most interesting and vigorous political campaigns in years. The setback given the archaic and unfair old county unit system by the courts brought new faces, new blood and maybe even new ideas to the big state races . . .
>
> "The result has been a wonderfully revised interest in politics and state government by both candidates and voters . . .
>
> "But there's new life in Georgia this year, new faces in politics and new voters registered in hopes of a fair deal."

August 12, 1962, Atlanta **Constitution**, under headline "POLITICIANS PURSUE CITY DWELLER VOTES":

"Under an August half-moon Saturday night, hundreds of Atlanta area residents watched a sight practically unknown in their lifetime—state politicians soliciting their votes.

"City dwellers often seem somewhat bemused and bewildered by their new-found popularity with state office seekers addressing them in the time-honored political phrase 'My fellow Georgians.'"

May 13, 1962, Atlanta Constitution, feature article under the heading "EVOLUTION NOT REVOLUTION":

"The shift in power has brought major changes to the state's political pageant now beginning for the fall elections.

"The five largest cities in Georgia all have candidates for major state office for the first time in many years.

"Suburban voters suddenly find themselves a prominent factor in politics.

"The clearest example is State Sen. Carl Sanders, a candidate for governor who many city voters think will win now, even though he might not have entered the race under the old 410-county unit system."

September 26, 1962, Atlanta Journal, editorial column of Eugene Patterson, regarding the campaign approach of the victorious candidate for Lieutenant Governor in a run-off election.*:

"A few hours after the first popular vote within most Georgians' memory was counted, the demagoging politician of county unit system days was gone.

* The candidate in question would have been elected in the September 12 primary under the county unit system but was thrown into a run-off on a popular vote basis.

"True, he was replaced the next day by a fellow who looked just like him, and bore the same name, and possessed the same record, and undoubtedly held the same ideas as strongly as he had ever held them. But he didn't talk the same.

"His bawl had moderated to a gentle benediction on the brotherhood of man; his unacceptably vulgar vocabulary had become the reasoned utterance of a gentleman. . . ."

The foregoing is but a brief sample of press reaction during the period commencing with the panel court's decision until after the conclusion of the Democratic primary.

It is respectfully submitted that it clearly rebuts the suggested inference that there was no difference, because in fact there was indeed a difference.

Proof of Service.

I, Morris B. Abram, one of the attorneys for James O'Hear Sanders, Appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the ... day of December, 1962, I served copies of the foregoing Brief on the several parties thereto, as follows:

On James H. Gray and George D. Stewart, as Chairman and Secretary, respectively, of the Georgia State Democratic Executive Committee, on the Georgia State Democratic Executive Committee, on the Georgia State Democratic Party, and on Honorable Ben W. Fortson, Jr., Secretary of State of the State of Georgia, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

To Lamar W. Sizemore, Esq., 715 C. & S. National Bank Building, Atlanta, Georgia, attorney for all defendants except Ben W. Fortson, Jr.

To Honorable Eugene Cook, the Attorney General, Judicial Building, Capitol Square, Atlanta, Georgia, B. D. Murphy, Esq., C. & S. National Bank Building, Atlanta, Georgia, and E. Freeman Leverett, Esq., Elberton, Georgia, attorneys for Ben W. Fortson, Jr., Secretary of State of the State of Georgia.

.....

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